

UTTER, J.\* (dissenting) — I dissent because the majority fails to present guidelines for future cases dealing with the same or similar issues. By merely disagreeing with the outcome of applying the plain language of the statute to the facts of this case, the majority leaves no discernible path for future cases to follow.

The majority asserts Justice Sanders is not entitled to representation because he knew or should have known that his conduct was unethical. This position is untenable as illustrated by the fact that the attorney general, not a member of the Commission on Judicial Conduct (Commission) or a private citizen, complained of Justice Sanders' misconduct. Holding that the attorney general has sole discretion under RCW 43.10.040 allows the attorney general both to initiate a complaint and to control an accused judge's entitlement to a defense. While the State retained private counsel at public expense, Justice Sanders was obliged to fund his own representation.

In the complaint, the attorney general asserts Justice Sanders violated Canons 2(A), 3(A)(4), 3(A)(5), and 3(D)(1). The Commission's subsequent statement of allegations includes violations of Canons 1, 2, 3(A)(1), 3(A)(4), 3(A)(5), and 7. Even though Justice Sanders was ultimately found to have violated only Canons 1

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\* Justice Robert F. Utter is serving as chief justice pro tempore of the Supreme Court pursuant to Washington Constitution article IV, section 2(a).

and 2(A), he was forced to defend against all the charges, personally assuming the burden of proving that many of them lacked merit. The majority cites no case law or statutory authority to support such an unreasonable result. As the majority recognizes, the cost of representation is not insignificant. Justice Sanders was awarded more than \$90,000 in reimbursement from the State for costs and expenses he incurred following the earlier complaint to the Commission. It is ironic that all of the resources of the State can be used to prosecute a judge accused of ethical misconduct, but none are available for his defense, even when most of the charges are not sustained.

In pertinent part, RCW 43.10.040 states unequivocally that the attorney general “shall . . . represent the state and all officials . . . of the state in the courts, and before all administrative tribunals or bodies of any nature, in all legal or quasi legal matters, hearings, or proceedings.”<sup>1</sup> Under the statute’s plain language, the State has an unqualified duty to represent judges accused of violating the Code of Judicial Conduct. The statute does not grant the State discretion to defer or to decline representation.<sup>2</sup>

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<sup>1</sup> “When an individual’s rights depend upon giving the word ‘shall’ an imperative construction, ‘shall’ is presumed to have been used in reference to that right or benefit and it receives a mandatory interpretation.” *Scannell v. City of Seattle*, 97 Wn.2d 701, 705, 648 P.2d 435, 656 P.2d 1083 (1982).

“Our primary duty in interpreting any statute is to discern and implement the intent of the legislature.” *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). The starting point is “the statute’s plain language and ordinary meaning.” *Nat’l Elec. Contractors Ass’n v. Riveland*, 138 Wn.2d 9, 19, 978 P.2d 481 (1999). “A statute that is clear on its face is not subject to judicial construction.” *State v. J.M.*, 144 Wn.2d 472, 480, 28 P.3d 720 (2001). “If the plain language of the statute is unambiguous, then this court’s inquiry is at an end.” *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

The majority nonetheless presents legislative history and dictionary definitions to conclude that representation of a judge charged with ethical violations is “beyond the purpose of RCW 43.10.040.” Majority at 7.

Indignation about Justice Sanders’ actions should not override established principles of statutory interpretation. He has already been admonished. Properly interpreting the plain language of the controlling law does not constitute an endorsement of his conduct.

“We should not and do not construe an unambiguous statute.” *Vita Food*

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<sup>2</sup> The legislature has qualified the attorney general’s duty to defend when a state officer is sued for damages (RCW 4.92.070) and when a state officer is accused of a crime (RCW 10.01.150). This case, however, concerns ethical violations, not a tort claim or criminal charge. The legislature has not limited the attorney general’s duty to represent judges accused of violating the Code of Judicial Conduct.

*Prods., Inc. v. State*, 91 Wn.2d 132, 134, 587 P.2d 535 (1978). The court is constrained to give the plain language of the statute its full effect.

I respectfully dissent.

AUTHOR:

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Tem. \_\_\_\_\_

WE CONCUR:

Daniel J. Berschauer, Justice Pro  
Tem. \_\_\_\_\_  
Frederick B. Hayes, Justice Pro Tem.  
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